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No. 94 - 878

In The
Supreme Court of the United States
October Term 1994

Gregorio Igartua, et al.,
Petitioners,

v.

United States
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

This Petition presents the peculiarity that the Attorney General of the United States, contrary to the dispositions of 42 USCA 1971-c is intervening on behalf of a discriminatory denial of voting rights to the class represented by petitioners (3.5 million American citizens).

I. THE COURT SHOULD RESOLVE THE QUESTION WHETHER RESPONDENT CAN CONTINUE TO DENY PETITIONERS THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS ON GROUNDS THAT ONLY CITIZENS FROM STATES CAN VOTE FOR ELECTORS.

Clause IV, Section 4 of the U.S. Constitution requires that the United States shall guarantee to every state in this Union a "Republican Form of Government". Within this context, Congress legistated to this effect for Puerto Rico, and the People of Puerto Rico adopted a constitution in 1952, as shown below:

-64 Stat 319. 8,1st Cong., 2D SESS, -CHS, 446.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, **fully recognizing the principle o government by consent**, this Act is now adopted so that the people of Puerto Rico may organize a government pursuant to a constitution of their own adoption. The **said constitution shall provide a republican form of government** and shall include a bill of rights.

-66 Stat. 327, Public Law 447-July 3, 1952.

"Resolved... that the constitution of Puerto Rico... **is hereby approved by the Congress of the United States.**

-Puerto Rico Constitution - Preamble

We, the people of Puerto Rico, in order **to be politically organized under democratic principles,** promote the general welfare and guarantee for us and our posterity the **full enjoyment of human rights**, with confidence in God Almighty, do order and establish this Constitution for the Free Associated State which in the exercise of our natural right **we create within our union with the United States of America.**

Doing so we declare:

"...That **we consider as determinant factors in our lives the American citizenship of the United States of America and the aspiration to continually enrich our democratic values in the individual and collective enjoyment of its rights and prerrogatives; the loyalty to the postulates of the Federal Constitution...**

These actions by respondent in 1950 & 1952 and by the People of Puerto Rico can only be morally and se-

riously interpreted as having being exercised legally and in good faith, and the democratic goals adopted must not be considered so that eventual results would be futile. But 45 years later respondent proposes to ignore them on grounds that it is not a state.

The distinction whether Puerto Rico is a territory; or whether it is unincorporated or not, has been considered not pertinent or determinative for some purposes; e.g., for nationality purposes since the conferral of american citizenship to persons born in Puerto Rico since 1940, (Restatement of the Law, Third, Amer. Inst., Foreign Relations Law of the U.S., Reporters' notes, pg. 121.). (But see *Romero v. U.S.*, 1994 WL 570581 (1st Cir. Oct. 19, 1994); *U.S. v. Sánchez* - 992 F 2d 1143. (11th. Cir.); *United States v. López Andino*, 83 F.2d 1164 (1st Cir. 1987)).

In *Trailer Marine Transport Corp v. Rivera*, 977 F2d 1 (1st Cir. 1992), the Court held a constitutional provision applicable as follows:

> "Today, the government of the Commonwealth of Puerto Rico in many respects resembles that of a state... Citizens of Puerto Rico, like citizens of the states, are citizens of the United States. 8 U.S.C. Sec. 1402. The United States guarantees Puerto Rico a republican form of government and Puerto Rico is bound to respect the rights, privileges and immunities of all citizens. 48 U.S.C. Sec. 731, 737. Compare U.S. Const. art. IV, Sec. 4; amend. XIV, Sec. 1...
>
> "...Against this background, we conclude that Puerto Rico is subject to the constraints of the dormant Commerce Clause doctrine **in the same fashion as the states.**"... (See document #40 of

Docket file in Appeal's Court).

Thus the Court below interpreted as applicable a constitutional provision within the context that full economic integration is as important to Puerto Rico as to any state in the Union and because Puerto Rico cannot erect an intermediate boundary separating it from the rest of the country, since it is not an "alter ego" of the federal government. But the same court rejected applying same principle to petitioners' claim of voting rights in Presidential elections, as a **"voting rights in Presidential elections integration"** principle.

Petitioners are in a position like in a dead end street considering the contradictory opinions of the courts and of the arguments by respondent. Moreso, if it is considered that the American citizens residents of Puerto Rico have a constitutional right to remain as U.S. citizens unless they voluntarily relinquish that citizenship, (*Afroyim v. Rusk*, 387 US 253), but even have not been allowed to renounce it to remain as nationals of this country. (*Santori v. U.S.*, 30 F3d 126).

On the other hand, the electors system is applicable to Puerto Rico as in essence it was a plan by the constitutional convention, devised to render the process untainted and free from impurities to afford a moral certainty that the office of President would seldom fall to any man not endowed with the requisite qualifications, and providing for direct vote for electors by the citizens (The Federalist Papers, Hamilton, Madison & Jay, 1961)

Clause IV Section 2 of the U.S. Constitution establishes that the citizens of each State shall be entitled to all Privileges and Immunities of citizens in the several States, and it was expressly made applicable by Congress to Puerto Rico. (48 U.S.C. 737, 1988). In rela-

tion to voting rights, section 1 of the U.S. Constitution, Amendment 15, establishes that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude". Petitioners are protected by this provision since this Court held that the local voting rights of Puerto Rican citizens are constitutionally protected to the same extent as those of all other U.S. citizens. *Rodríguez v. Popular Democratic Party*, 457 U.S. 1, 7-8 (1982). Thus, respondent's discriminatory denial to petitioners and the opinions of the courts below are in conflict with such court's holding, and this contradiction justifies that the petition be granted to clarify it.

In *Oregon v. Mitchell*, 400 U.S. 112 (1970), this Court upheld the constitutionality of the Voting Rights Act and confirmed Congress' broad authority to make or alter laws regulating national elections... Within this authority, Congress adopted in January 3, 1995 the National Voter Registration Act 42 USCA 1973gg-1 providing that:

> (1) the right of citizens of the United States to vote is a fundamental right;
>
> (2) it is the duty of the Federal Government to promote the exercise of that right; ...(42 USCA 1977gg-a1 & 2).

Under prevailing legal and judicial precedents such legislation is also applicable to the American citizens residents of Puerto Rico and justifies legally further why the Petition should be granted.

II. THE COURT SHOULD RESOLVE THE QUESTION WHETHER RESPONDENT CAN DENY PETITIONERS THE RIGHT TO VOTE IN PRESIDENTIAL ELECTIONS ON GROUNDS THAT THE TREATY IS NOT SELF-EXECUTING.

Respondent argued that petitioners raised for the first time on appeal that their inability to vote in presidential elections violates Article 25 of the Treaty of International Covenant on Civil and Political Rights (99 U.N.T.S. 171), and which entered into force Sept. 8, 1992, after claim was submitted in District Court. Notwithstanding, any doubts on why issue was raised on appeal should be resolved in favor of petitioners, since issue is a legal one of continuing importance for this class action. (*Trailer Marine Transport Corp.* Case, infra).

It is pertinent to inform this Court of the following acts by respondent after Petitioners Brief was submitted.

> December 9-11 1994 Respondent was a signatory to the SUMMIT OF THE AMERICAS DECLARATION OF PRINCIPLES, which established that:
>
> ...We reaffirm our commitment to preserve and **strengthen our democratic systems** for the benefit of **all people** of the Hemisphere. (Miami, Florida). (Compare with answer 22 of complaint).
>
> December 14, 1995 - The White House, December 14, 1994, "Statement by the Press Secretary" - The Administration announced today a program to assist the revitalization of the Haitian economy. The package of measures reflects President Clinton's conviction that creating productive employment for Haitians is the key to self-sustaining economic recovery and **strenghtening** Haiti's restored democracy.

Respondent's acts shows its commitments to democracy abroad and also that it interprets its international obligations in such a way so that practical democracy for foreign policy purposes be far in advance than democracy within its jurisdictional boundaries.

On the other hand, respondent's interpretation of its treaty obligations are contradictory in this case. Respondent pretends that the treaty of Covenant of Political Rights is not self-executing (opp. B at 8), to justify that "it does not give rise to privately enforceable rights", as those voting rights claim in this action. The net result of this interpretation is that the human and civil rights the treaty attempts to guarantee and protect in sections 1-27 are not applicable within the U.S. jurisdiction, but that the only sections applicable are 28-53 which deals with the administration of the treaty, recognizing it out but not in.

Under international law practice a treaty is generally binding on states parties from the time it comes into force for them, whether or not it is self-executing for a state party, that state is obliged to implement it promptly, and failure to do so would render it in default on its treaty obligations. (Ch. 2, Restatement of the Law, Third, Amer. Inst., Foreign Relations Law of the U.S., pg. 55). Moreso, consider the disposition of Article 40 of the Treaty, which respondent accepts to be self-executing, and which requires the signatory country to submit reports on the measures adopted to give effect to the rights recognized in the treaty. Will respondent inform about this claim to meet its obligation under the treaty? Within this context consider that Article 3 of the treaty requires the United States to "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in it. (See also obligations under Art. 2).

Respondent proposes that the treaty cannot override specific limitations contained in the Constitution (opp. B at 8). Notwithstanding the treaty requires in Article 5 that the signatory country cannot restrict the funda-

mental human rights as set forth in it on the pretext of recognizing them to a lesser extent for domestic reasons. How can the equal protection clause of Art. 26 of the treaty be in conflict with the equal protection clause of the U.S. Constitution for voting rights purposes claimed by petitioners, if this Court established that the voting rights of the American citizens of Puerto Rico are constitutionally protected to the same extent as those of all other U.S. citizens? (*Rodríguez v. PPD* 457 US 1 (1982)). An argument by respondent which deserves special attention by this Court, is the comment at footnote 4, pg. 9, stating that... "**It is not clear** that there is any conflict between the general provisions of Art. 25 of the treaty and the inability of Puerto Ricans to vote for electors for president"... This Court should grant the Petition to clarify the erroneous opinions of the Courts below, the unfounded arguments of respondent, and because under article 3 of the treaty the United States is under the obligation to provide a judicial remedy to petitioners.

III. THE COURT SHOULD GRANT THE PETITION TO RESOLVE UNDER STRICT SCRUTINY TEST WHETHER OVERSEAS VOTING ACT IS UNCONSTITUTIONAL BY EXCLUDING AMERICAN CITIZENS MOVING TO PUERTO RICO FROM VOTING IN PRESIDENTIAL ELECTIONS

Congress recognized a class of voters by enacting the Overseas Voting Act. Citizens moving from one state to another are not discriminated by the Act because they keep their voting right in Presidential elections, while those moving to Puerto Rico lose the voting right unless they move to a foreign country where they continue voting absentee. Respondent proposes that the text of the absentee vote law prevails, because it is the law, even though it is discriminatory.

Petitioners request this Court to apply the strict scrutiny test to the discriminatory voting denial of the Act. Respondent has shown no "compelling state interest" to justify the burdens imposed to those American citizens moving residence to Puerto Rico and losing their right to vote in Presidential elections. There is no less restrictive alternative that a state can implement to the losing of such voting right. Respondent proposal that citizens who move to Puerto Rico can still vote for a Resident Commissioner to Congress is not a "like kind alternative".

The *Katzenback v. Morgan* (384 US 641) case is not applicable to this claim since such case deals with a mere limitation related to elections, and here the issue involves a complete denial of the vote. Nor is respondent's argument acceptable expossing that there will be disuniformity if some citizens can vote absentee from Puerto Rico and not others, because the "equal protection of the laws" clause applies in Puerto Rico (*Rodríguez v. PPD*, 457 US1). Inversely, the discriminatory denial to all American citizens in Puerto Rico cannot be used to justify the discriminatory denial of the absentee vote act to some. The equal protection must be given to all under "like circunstances" in their enjoyment of civil rights (*Truax v. Corrigan*, 257 US 312). Thus, citizens moving to Puerto Rico from states are in "like circunstances" as those moving from states to foreign countries, and should not therefore lose their acquired voting right by reason of moving residence to Puerto Rico. Moreso, all American citizens must be equally protected by Congress. It is class legislation as the one at issue here, discriminating against some and favoring others, that is prohibited by the equal protection guarantee. (*Douglas v. California*, 372 U.S. 353).

Respondent's contradictory positions warrant that this Court grants the Petition. Consider that in January 1995, respondent started judicial action against four States to enforce the National Voting Registration Act. In this case, for purposes of the federal absentee vote denial respondent argued in the Courts below that it is states who primarily regulate elections. In the four cases, respondent argues strongly that it is the federal government who regulates federal elections preempting any state action on this matter, and as follows: ..."The Act attempts to extend the fundamental right of citizens in a democracy -the right to vote to as many Americans as possible...". The only discriminatory exception to this postulate applies to the American citizens residents of Puerto Rico, as evidenced in this action. The Federal District Court held in favor of the position of the Federal Goverment.

(*California v. U.S.*, Case No. 95-20042JW, Northern Dist.). See also: *U.S. v. Penn.*, No. 95-CV-0382 (Eastern Dist.)); *U.S. v. Illi.*, No. 95-C0433 (Northern Dist., Eastern Div.); *Condon v. Reno*, No. 3-951920 (Dist. of South Carolina).

CONCLUSION

For the foregoing reasons, and those exposed in the Brief, the petition for a writ of Certiorari should be granted.

Respectfully submitted,

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